Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-36

ARTHUR T. DAVIDSON, M. D.

Petitioner

-against-

JAMES KIRBY, GEORGE LEONE, WILLIAM STEIBEL and WILLIAM J. DUNN

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above-entitled case on April 3, 1975.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court and of the Court of Appeals is set forth in the Appendix attached hereto, infra, p. 1a, and p.6A.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1975, (p. 6A, infra). Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1), petitioner having asserted below and claiming here, denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Whether there is a "property interest" in the continuance of provisional employment that is protected by the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was appointed to the position of Medical Director, Medical Assistance Program, Suffolk County, State of New York, on May 28, 1973, by John Kirby, Commissioner of Social Services, Suffolk County, State of New York.

Petitioner faithfully, full, and in a highly satisfactory manner for a period of approximately seven months performed all of the duties associated with this position and was highly commended, and praised by his immediate supervisor, William Stiebel.

Petitioner is an eminently qualified physician who was licensed to practice medicine in the State of New York in September 1948; is a Board Certified General Surgeon; and Assistant Clinical Professor of Surgery at the Albert Einstein College of Medicine, New York, New York, a Cancer Research Scientist with cancer

research laboratories at Maimonides Medical Center, Brooklyn, New York, and the Methodist Hospital, Brooklyn, New York, and a June, 1974, graduate of St. John's University School of Law.

The Civil Service laws of the State of New York Section 65, sub-paragraph 2 requires that a civil service examination for this position be given within one month after an appointment to this position. (McKinney's New York State Laws - Civil Service Law Section 65). This requirement of the Civil Service Law was not complied with.

In a letter dated October 24, 1973, and signed by William J. Dunne, Petitioner was notified that he was "hereby suspended from the position of Medical Director of the Medical Assistance Program effective this date. Charges will follow by Registered Mail."

In a letter dated October 30, 1973, and signed by William J. Dunne, Petitioner was

notified that he was terminated effective that date from the position of Medical Director of the Medical Assistance Program, Suffolk County, State of New York.

Petitioner was: (1) never informed of the charges against him, nor (2) was he afforded an opportunity to respond to these charges.

Petitioner alleges that: (1) the failure to inform him of the nature of the charges against him, and; (2) to afford him an opportunity to respond, is a violation of his civil rights as guaranteed by the "due process" clause of the Fourteenth Amendment to the Constitution of the United States.

The District Court and the Court of Appeals for the Second Circuit held that there is no property interest in the continuance of provisional employment.

REASONS FOR GRANTING THE WRIT

This case involves substantial questions affecting important constitutional rights of a large majority of the citizens of the United States who work for a living. Additionally, of great importance, is the fact that in actual practice blatant, overt job discrimination, based on race and minority status, results in that persons in these classes are systematically classified as provisionals, thereby excluding them from the protection of the Fourteenth Amendment of the United States Constitution.

1.

THE RULING THAT PROVISIONAL EMPLOYEES HAVE NO "PROPERTY INTEREST" IN CONTINUANCE OF EMPLOYMENT IS AN UNFAIR BURDEN ON THE MAJORITY OF UNITED STATES JOB HOLDERS.

It is true that this Court in Russell v. Hodges, 470 F. 2d 212, (1972) held that provisional employees have no "property interest"

in continued employment. However, Mr. Justice Marshall in his dissent in Board of Regents v. Roth was of the opinion that, "a public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely or whenever the State deprives him of a property interest, I would go further than the Court does in defining the terms 'liberty' and 'property'. He pointed out that the United States Supreme Court has long maintained that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure." Truax v. Raich, 239 U.S. 33, 41 (1915) (Hughes, J.). See also Meyer v. Nebraska, 262 U. S. 390, 399 (1923). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does

not mean that as the result of action by the government he may be "discharged at any time for any reason or for no reason." Truax v. Raich.

In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty--liberty to work--which is the "very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment."

In Perry v. Sindermann the Court referring to Roth stated "that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules

or understanding." A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

We are asking the Court to expand its definition of a "property interest" that falls within the protection of the "due process" clause of the Fourteenth Amendment.

THE PROVISIONAL CLASSIFICATION IS USED AS A MEANS OF PRACTICING RACIAL AND OTHER MINORITY GROUP DISCRIMINATION.

The syndrome of "last to be hired and first to be fired" affects more than 90% of Black employees. It affects an equally large number of other minority groups and women.

The legal underpinning for this vicious, blatant, reprehensible racial and minority status discrimination is provided by past Court Rulings that there is no property interest in the continuance of provisional employment.

Every study by numerous investigators has revealed the same pattern of overt statistical pattern of employment discrimination against minorities and women in every type of business firm, industrial corporation, financial institution, construction company and even the Federal Government contractors.

More than 1/3 of the non-white population, according to statistics of the U.S. Bureau of

the Census compiled in 1971 were below the officially designated poverty level in 1970. This compares to 1/10 of the white population. Additionally, the Black median family income was less than 2/3 of the White.

Less than 1/5 of Whites were in the poorly-paid unskilled jobs at the lower end of the employment spectrum, however, nearly half of the Blacks were so employed. More depressing was the fact that well over half of the employed Whites held white-collar jobs compared to under 1/20 for Blacks.[1]

A study by the Equal Employment Opportunity Commission of "White Collar Employment in 100 Major New York City Corporations" in 1968 showed how poorly represented minorities were at the management and lower management grades even in

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[1]SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES, 1971, U. S. Bureau of the Census, Current Population Reports, Series P-23, No. 42. Washington, D.C.: U. S. Government Printing Office, 1972.

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companies with comparatively good reputations for minority hiring.

Significantly, the EEOC found that this pattern of underutilization of minorities in white-collar jobs is general and also includes females.[2]

[2] JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY, U. S. Equal Employment Opportunity Commission, Office of Research, Washington, D.C.

CONCLUSIONS

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR T. DAVIDSON, M. D. pro se
16 Montgomery Place
New Rochelle, New York 10804

Attorney for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

In the Matter of the Application

of

ARTHUR T. DAVIDSON, M. D. etc.,

Plaintiff,

-against-

JAMES KIRBY, Commissioner of Social Services, Suffolk County, State of New York, et al.,

Defendants.

----------X

74-C-331

June 19, 1974

Appearances:

ARTHUR T. DAVIDSON, M. D.
Plaintiff, pro se

HON. GEORGE A. PERCY, JR.
Suffolk County Attorney
Attorney for Respondents

By: STANLEY S. CORWIN, ESQ.
Of Counsel

JUDD, J.

MEMORANDUM AND ORDER

Defendants have moved to dismiss this civil

rights action for lack of jurisdiction in various aspects, or to stay the action pending the determination of a proceeding in the state court.

Plaintiff seeks to review his dismissal from a provisional post as Medical Director of the Medical Assistance Program of the Suffolk County Department of Social Services.

Facts

Plaintiff was appointed as a provisional employee in a competitive class position on May 28, 1973 at a salary of approximately $31,000. Although the New York Civil Service Law (Section 65) requires that provisional appointees to positions in the competitive class take a civil service examination within one month after their appointment, the State Civil Service Commission had not promulgated any examination up to October 24, 1973, on which date plaintiff was dismissed by the Director of

Administrative Services of the Department of Social Services.

Plaintiff is black, and asserts that there are few blacks in supervisory or line positions in the Suffolk County Department of Social Services, which defendants deny. Plaintiff does not allege any facts indicating that his dismissal racially inspired.

Plaintiff asserts that he was arbitrarily dismissed for being two hours late on one day when his automobile broke down and that his record of attendance had been perfect for four months, apart from three days personal leave. Defendants assert that plaintiff had a poor attendance record and was not giving full time to his job, that he was still going to law school, teaching medicine, carrying on an active medical and surgery practice in Brooklyn (which plaintiff says he gave up in order to take the Suffolk County job), and living in Westchester.

They assert that he "was not producing" as required for the Suffolk County job.

Plaintiff began an Article 78 proceeding in the Suffolk County Supreme Court on October 17, 1973 to prohibit his contemplated dismissal. An order to show cause was obtained, with a stay which expired on October 24, 1973.

The Suffolk County proceeding was dismissed by Mr. Justice Underwood on December 19, 1973. The primary ground of dismissal was that the petition was not served on any of the necessary parties under NYCPLR Sec. 311 (4). Alternatively, the court stated that the petition was subject to dismissal because a provisional employee does not obtain civil service status and is not entitled to retain his position upon being discharged.

Dicussion

Much of plaintiff's memorandum is devoted to state law questions as to his procedural rights. Under federal law, the right to remain in a provisional post is similar to a teacher's right to achieve tenure, which is actionable in a federal court only if there is (1) denial of First Amendment rights, (2) infringement of a property interest under the Fourteenth Amendment, or (3) deprivation of liberty under the Fourteenth Amendment. Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694 (1972); Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972).

There is no showing of any violation of plaintiff's First Amendment rights.

There is no property interest in the continuance of a provisional employment. Simard v. Board of Education, 473 F.2d 988 (2d Cir. 1973).

There is no showing of any injury to

plaintiff's reputation or his ability to obtain future employment. Canty v. Board of Education, 470 F.2d 1111 (2d Cir. 1972), cert. denied, 412 U.S. 907, 93 S. Ct. 2301 (1973); Russell v. Hodges, 470 F. 2d 212 (2d Cir. 1972).

Since no personal jurisdiction of necessary parties was obtained in the state court action, its pendency would not justify federal abstention, even though plaintiff has appealed to the Appellate Division. In any event, the lack of merits in this action makes it unnecessary to consider whether to defer to the state court.

It is ORDERED that the defendants' motion be granted, and that the action be dismissed for failure to state a claim upon which this court may grant relief, but with leave to amend the complaint within thirty days.

/s/ ORRIN G. JUDD

U. S. D. J.

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of April one thousand nine hundred and seventy-five.

Present:

HON. ROBERT P. ANDERSON

HON. WALTER R. MANSFIELD

HON. JAMES L. OAKES

Circuit Judges,

74-2019

In the matter of the application of Arthur T. Davidson, M.D. for an order prohibiting respondents from terminating petitioner's employment as medical director of the Medical Assistance Program, County of Suffolk, State of New York, prior to notifying petitioner of the nature of the charges against him and affording him the opportunity to respond.

Arthur T. Davidson, M. D.,

Plaintiff-Appellant,

v.

James Kirby, Commissioner of Social Services, Suffolk County, State of New York, George Leone, Commissioner of Health, Suffolk County, Stateof New York, William Stiebel, Medical Assistance Administrator, Suffolk County, State of New York, William J. Dunn, Director of Administrative, Suffolk County, State of New York,

Defendants-Appelles

Appeal from the United States District Court for the Eastern District of New York.

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This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed. Rejection of appellant'sdue process claim is required by the Supreme Court's decision in Board of Regents v. Roth 408 U.S. 564 (1972) and his equal protection argument was considered and rejected by us in Rusell v. Hodges 470 F2 212 (2 Cir. 1972). Each side is to bear its own costs.

/s/
HON. ROBERT P. ANDERSON

/s/
HON. WALTER R. MANSFIELD

/s/
HON. JAMES L. OAKES
Circuit Judges